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IN THE

Supreme Court of the United States

October Term, 1964

No. 706

MILTON M. LEVIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

JACOB W. FRIEDMAN,
Attorney for Petitioner.

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

IN THE

Supreme Court of the United States

October Term, 1964

No. 705

MILTON M. LEVIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

Statement

The Government's brief in opposition contains certain statements and arguments necessitating the present reply. Our refutation employs the same numbers as are employed by the Government.

In its statement (brief, p. 4), the Government appears to develop the impression that the union's payment of $20,000 to petitioner in 1959 was unearned and that some officials of the International were not aware of his services. Actually that sum consisted of $2,500 for expenses and $17,500 for substantial services to the International. These included acting as Congressional representative in connection with pending labor-management legislation—an employment for which petitioner duly filed in conformity with

the applicable law (Tr. 686-687); the planning of a television program on the subject of labor legislation (Tr. 688); and legal services in litigation in the New York Supreme Court in March, 1959 (Tr. 681). Payment for the foregoing was made over a period of time by six checks, the last of them in December, 1959 (Govt. Exs. 14-19; Tr. 685, 692-693, 876-877, 996-997).

1. With respect to our contention predicated upon the grave injustice of permitting conviction on the uncorroborated, impeached, contradicted and discredited testimony of an accomplice, the Government now makes a concession which should suffice to invalidate the conviction herein. The case rests solely upon the testimony of "accomplice" Landriscina that he made two payments to petitioner (Tr. 15-22) namely, $10,000 on Thursday February 12, 1959, and $25,000 the next day on Friday February 13, 1959. There is not the slightest doubt that Landriscina asserted those two payments as having been made on two separate days. On at least ten separate occasions (Tr. 17, 18, 19, 25, 90, 96, 120) he declared and reiterated that the $10,000 payment was made on Thursday, February 12, finally (Tr. 120) asserting that he was absolutely sure of the date. The Court charged the jury (Tr. 1065) it would be sufficient to convict for the Government to prove that "either of these sums" was turned over to the defendant. Consistently with this instruction, the jury may well have based its verdict solely on the alleged payment of Thursday, February 12—particularly in the light of the cogent proof of petitioner's departure from Washington not later than 1 P.M. on Friday, February 13 (TR. 501-503, 695, 700-701, 732), with Landriscina testifying as to the $25,000 payment at 5 P.M. of that day (Tr. 25-26) upon Landriscina's return

from Williams' office—a story refuted by all other credible evidence.

Now the Government admits (brief, footnote, p. 3):

> "Landriscina testified, apparently incorrectly, that he made the first payment of $10,000 on February 12 (R. 19-25)."

In short, the Government, notwithstanding the positiveness of its sole witness as to the transaction and the likelihood that this testimony produced a guilty verdict, makes the belated admission of the incorrectness. Reluctant and euphemistic as the concession may be, it certifies a situation wherein the Court is confronted with a judgment of conviction whose prop is admittedly false testimony.

The foregoing recognition, especially when coupled with the other elements of the case completely impeaching, contradicting and discrediting the "accomplice" to which we have previously adverted, is a strong bulwark of the exceptional circumstances warranting consideration by this Court in the interests of fundamental justice.

The Government suggests that the testimony of Landriscina "was corroborated circumstantially," and points to Belloni's testimony as an example. But even the trial Court instructed that Belloni might himself be an accomplice (Tr. 1055). The general rule of law is that where an accomplice is required to be corroborated, the testimony of another accomplice is not sufficient. 7 Wigmore on Evidence (3d ed.) Sec. 2059. "The corroboration must always be some witness other than another accomplice." *People* v. *Mullens*, 292 N.Y. 408. It must be evidence from an independent source. *People* v. *Goldstein*, 285 N.Y. 376.

Therefore, the basic question meriting thorough consideration by this Court is not to be eliminated by untenable references to factors not rising to the level of validity.

3. The Government seemingly recognizes that the representations essential to larceny by trick, if made to Cross, the individual, may not be considered as transmitted through him to the union. In support of what is obviously an unsound ruling, the Government takes refuge in the assertion that this is merely a matter of local law. Such a position is no adequate answer to our argument that it was error for the Courts below to regard the conduct of Cross as having occurred in his capacity as an official when the undisputed evidence demonstrates all of his actions to have been personal and in no respect representative. In any event, it is a violation of reason and sound legal principle to denominate the resolution of the question as one of local law.

5. The Government argues (p. 8), concerning petitioner's attack on the summation that "the point was not raised in either court below." This assertion is doubtless an inadvertence, for in the Court of Appeals (reply brief, p. 10) specific exception was taken to the denigration of the defense's character witness, and the very passage quoted in the Government's present brief was likewise quoted by petitioner. Likewise our exception to the prosecution's improper reference to restaurants was likewise raised (ibid., p. 11).

CONCLUSION

For the foregoing reasons, in addition to those urged in the petition, the application for certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

December, 1964.